Johor Capital Holdings Sdn Bhd v Frank Khoo Shao Hong

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D1–22–2619 OF 1999
VINCENT NG J
26 NOVEMBER 2001

Contract *— Assignment — Privity — Party assigned all rights, benefits and interest under agreement to plaintiff — Whether assignment valid — Whether plaintiff could claim under contract*

Contract *— Option to purchase shares — Exercise of — Valid or sufficient notice needed to be served on defendant to exercise put option — Whether valid or sufficient notice served upon defendant — Whether time frame for exercising put option expired*

Contract *— Privity — Put option — Party assigned all rights, benefits and interest under agreement to plaintiff — Whether assignment valid — Whether plaintiff could claim under contract*

The plaintiff alleged that by a written agreement dated 24 June 1997, between PJB Capital Sdn Bhd ('PJB Capital'), a wholly owned subsidiary of the plaintiff, and the defendant, the defendant had agreed to, inter alia, irrevocably grant PJB Capital a put option ('the put option'), where PJB Capital secured the right to require the defendant to purchase certain shares ('the option shares') from PJB Capital at the exercise price as defined in the option agreement. The put option was exercisable by PJB Capital within six months, expiring on 24 December 1997 and commencing from the date of commencement of the option agreement, unless extended. It was pleaded that by an exercise notice dated 17 December 1997, PJB Capital exercised the put option. Subsequently, by a letter dated 30 December 1997, PJB Capital agreed to extend the put option agreement by six months to 24 June 1998. By a further notice dated 17 June 1998, PJB Capital exercised the put option. The defendant did not purchase the shares, and by a letter dated 10 March 1999, PJB Capital informed the defendant that all its rights, benefits and interest in the agreement would be transferred to the plaintiff with effect from 24 December 1998. Consequently, the plaintiff claimed, inter alia, specific performance of the option agreement or damages. The defendant raised two issues before the senior assistant registrar ('SAR'), ie there was no privity of contract between the plaintiff and the defendant and no valid or sufficient notice was served on the defendant and that the time frame for exercising the put and call option had expired. The SAR allowed the defendant's application to strike out the plaintiff's statement of claim. The plaintiff appealed.

Held, dismissing the appeal with costs:

(1) The agreement was entered into between PJB Capital and the defendant, and despite the fact that the plaintiff was the holding

company of PJB Capital, the two companies were two separate and distinct corporate entities. It was not pleaded in the statement of claim that an agreement had been entered between the plaintiff and the defendant or that the defendant was a party to the alleged assignment. The material facts and particulars making out a prima facie case of such assignment had, essentially and vitally, to be pleaded in the statement of claim and could not be supplemented by affidavit evidence. Even if so pleaded, the defendant's rebuttal by affidavit of such averment(s) in the statement of claim would have to be countered by the plaintiff also by affidavit. Nowhere, not even in para 10 of the statement of claim, was it pleaded that the option agreement had been assigned to the plaintiff pursuant to cl 19.2. Further, in para 4 of his affidavit (encl 7), the defendant averred that there was never any agreement entered between the plaintiff and the defendant, and this was not rebutted by the plaintiff (see pp 696C–F, I–697A).

(2) The plaintiff's counsel himself conceded that the plaintiff's affidavits did not contain any assertion that there was assignment of the put and call option by PJB Capital to the plaintiff (see p 697C–D).

(3) Even if there was a valid assignment, the option agreement had expired by effluxion of time because the plaintiff had failed to exercise their rights within the option period, considering that there was no valid or sufficient notice served on the defendant. The impugned notice dated 17 December 1997 was sent in a manner contrary to cl 16.1 of the option agreement as it was forwarded by ordinary post and not by registered post, it was sent to Capital Corp Securities Sdn Bhd and not to the defendant and it was sent to an address which was different from the defendant's address in the option agreement. Without the notice, there was no cause of action and the time frame for exercising the put and call option had lapsed (see p 697E–F).

[Bahasa Malaysia summary

Plaintif telah mendakwa bahawa melalui satu perjanjian bertulis bertarikh 24 Jun 1997, antara PJB Capital Sdn Bhd ('PJB Capital'), sebuah anak syarikat sepenuhnya milik plaintif, dengan defendan, defendan telah bersetuju untuk, antara lain, memberikan secara tak boleh batal kepada PJB Capital satu opsyen put ('opsyen put'), di mana PJB Capital telah terjamin hak untuk menghendaki defendan membeli saham-saham tertentu ('saham-saham opsyen tersebut') daripada PJB Capital pada harga penggunaan sebagai mana yang ditafsirkan dalam perjanjian opsyen. Opsyen put tersebut boleh digunakan oleh PJB Capital dalam tempoh enam bulan, dan luput pada 24 Disember 1997, dan bermula daripada tarikh mulanya perjanjian opsyen tersebut, kecuali dilanjutkan. Adalah diplikan bahawa melalui satu notis penggunaan bertarikh 17 Disember 1997,

PJB Capital telah menggunakan opsyen put tersebut. Berikutan itu, melalui sepucuk surat bertarikh 30 Disember 1997, PJB Capital telah bersetuju untuk melanjutkan perjanjian opsyen put tersebut selama enam bulan kepada 24 Jun 1998. Melalui satu notis selanjutnya bertarikh 17 Jun 1998, PJB Capital telah menggunakan opsyen put tersebut. Defendan tidak membeli saham-saham tersebut, dan melalui sepucuk surat bertarikh 10 Mac 1999, PJB Capital telah memaklumkan defendan bahawa semua hak, faedah dan kepentingannya dalam perjanjian tersebut akan dipindahkan kepada plaintif mula berkuatkuasa pada 24 Disember 1998. Akibatnya, plaintif telah menuntut, antara lain, pelaksanaan spesifik terhadap perjanjian opsyen tersebut atau ganti rugi. Defendan telah menimbulkan dua persoalan di hadapan penolong kanan pendaftar ('PKP'), iaitu tidak terdapat priviti kontrak antara plaintif dan defendan dan tiada notis yang sah atau mencukupi telah disampaikan ke atas defendan dan bahawa jangka masa untuk menggunakan opsyen put dan call tersebut telah luput. PKP telah membenarkan permohonan defendan untuk membatalkan pernyataan tuntutan plaintif. Plaintif telah membuat rayuan.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Perjanjian yang dimasuki adalah antara PJB Capital dan defendan, dan walaupun hakikat bahawa plaintif adalah syarikat pemegangan PJB Capital, kedua-dua syarikat tersebut adalah entiti korporat yang berasingan dan berbeza. Ia tidak diplikan dalam pernyataan tuntutan bahawa satu perjanjian telah dimasuki di antara plaintif dan defendan atau bahawa defendan adalah satu pihak terhadap dakwaan penyerahakan. Fakta-fakta dan butir-butir yang material yang membentuk satu kes prima facie terhadap penyerahakan tersebut telah, secara pada dasarnya dan amat penting, diplikan dalam pernyataan tuntutan dan tidak boleh dibawa masuk melalui afidavit keterangan. Walaupun diplikan, pematahan defendan melalui afidavit tentang penegasan sebegitu dalam pernyataan tuntutan tentu perlu ditentang oleh plaintif juga melaui afidavit. Tiada diplikan di mana-mana, walaupun dalam perenggan 10 pernyataan tuntutan, bahawa perjanjian opsyen tersebut telah diserahak kepada plaintif menurut kl 19.2. Tambahan pula, dalam perenggan 4 afidavit beliau (lampiran 7), defendan telah menegaskan bahawa tidak pernah ada apa-apa perjanjian yang telah dimasuki antara plaintif dan defendan, dan ini tidak dipatahkan oleh plaintif (lihat ms 696C–F, I–697A).

(2) Peguam plaintif sendiri telah mengaku bahawa afidavit-afidavit plaintif tidak mengandungi apa-apa penegasan bahawa terdapat penyerahakan opsyen put dan call tersebut oleh PJB Capital kepada plaintif (lihat ms 697C–D).

(3) Walaupun terdapat penyerahakan yang sah, perjanjian opsyen tersebut telah luput dengan aliran masa kerana plaintif telah gagal

untuk menggunakan hak-hak mereka dalam tempoh opsyen tersebut, dengan mengambilkira bahawa tidak terdapat notis yang sah atau mencukupi yang telah disampaikan ke atas defendan. Notis yang dipersoalkan yang bertarikh 17 Disember 1997 telah dihantar dengan cara yang bertentangan dengan kl 16.1 perjanjian opsyen kerana ia telah dikemukakan melalui pos biasa dan bukan melalui pos berdaftar, ia telah dihantar kepada Capital Corp Securities Sdn Bhd dan bukan kepada alamat defendan dalam perjanjain opsyen tersebut. Tanpa notis tersebut, tiada terdapat kausa tindakan dan jangka masa untuk menggunakan opsyen put dan call tersebut telah luput (lihat ms 697E–F).]

Notes

For cases on assignment generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1895–1933.

For cases on privity of contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1928–1929 and 3448–3472.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)

Chartered Bank v Yong Chan [1974] 1 MLJ 157 (refd)

Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363 (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356 (refd)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)

Esso Petroleum Co Ltd v Southport Corp [1956] AC 218 (refd)

Farrel v Secretary of State [1980] 1 All ER 166 (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (refd)

Lee Tee & Anor v Seek Lai Neo & Anor [2000] 2 CLJ 761 (refd)

Muniandy & Anor v Muhamad Abdul Kader & Ors [1989] 2 MLJ 416 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)

Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries [1989] 3 MLJ 246 (refd)

Suppuletchmi v Palmco Bina Sdn Bhd [1994] 2 MLJ 368 (refd)

United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d)

A *Mohd Izral Khairy* (*Shearn Delamore & Co*) for the appellant/plaintiff.
TJ Su (*HV Yoong* with him) (*Cheah Teh & Su*) for the respondent/defendant.

Vincent Ng J:. This is the plaintiff's appeal against the decision of the senior assistant registrar ('the SAR') on 26 May 2000, allowing the B defendant's application to strike out the plaintiff's statement of claim under O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of the High Court 1980 ('the RHC') and/or the inherent jurisdiction of the court.

Shortly stated, the plaintiff alleged that by a written agreement dated 24 June 1997 ('the option agreement'), entered into between PJB Capital Sdn Bhd, formerly known as PJB Capital Holdings Sdn Bhd ('PJB C Capital'), a wholly owned subsidiary of the plaintiff, and the defendant, the defendant had agreed, inter alia, to irrevocably grant PJB Capital a put option ('the put option'). By this put option, PJB Capital secured a right to require the defendant to purchase 1,840,000 issued ordinary shares of RM1 each in Kai Peng Bhd ('the option shares') from PJB Capital at the exercise D price, as defined in the option agreement which, inter alia, contained the following terms and conditions:

(a) the put option shall be exercisable by PJB Capital within the option period which shall be a period of six months, expiring on 24 December 1997, and commencing from the date of commencement of the option E agreement unless extended by the parties in writing;

(b) extensions of the option period shall be on the same terms and conditions contained in the option agreement; and

(c) upon the exercise of the put option, PJB Capital shall sell and the defendant shall buy the option shares at the exercise price which is as defined in the option agreement. F

It was pleaded that by an exercise notice dated 17 December 1997, PJB Capital exercised the put option and required the defendant to buy the option shares on 24 December 1997. Subsequently, by a letter dated 30 December 1997, PJB Capital agreed to extend the put option period by six months to 24 June 1998, and increased the exercise price and the number G of option shares to 2,300,000. And, by a further exercise notice dated 17 June 1998, PJB Capital exercised the put option and required the defendant to buy the option shares on 24 June 1998. It was further pleaded that in breach of the terms and conditions of the option agreement, the defendant failed, refused and/or neglected to purchase the option shares and pay PJB Capital the exercise price amounting to RM24,398,400 as at 24 June 1998. H And, by a letter dated 10 March 1999, PJB Capital informed the defendant that pursuant to cl 19.2 of the option agreement, all its rights, benefits and interest in the said agreement 'will be assigned' to the plaintiff being the holding company of PJB Capital, with effect from 24 December 1998.

Consequently, the plaintiff claimed: I

(i) specific performance of the option agreement;

(ii) damages in addition to or in lieu of specific performance;

(iii) interest at the rate of 8%pa from 26 June 1998 till full and final payment of the aforesaid sums; and

(iv) costs.

Before the SAR, there were only two issues raised by the defendant in his application to strike out the plaintiff's claim, being that:

(i) there was no privity of contract between the plaintiff and the defendant and the plaintiff had, neither in their pleadings nor in their opposing affidavits shown that there was any or any proper assignment pursuant to cl 19.2 of the option agreement, such as would clothe the plaintiff with a cause of action; and

(ii) even if there was a proper assignment under cl 19.2 of the option agreement, no valid or sufficient notice was ever served on the defendant pursuant to the option agreement, and that the time frame for exercising the put and call option had expired.

On the first issue, it must be borne in mind that the said agreement (exh 'JMA-2' of encl 10A) was entered into between PJB Capital Holdings Bhd and the defendant. And despite the fact that the plaintiff is the holding company of Messrs PJB Capital Sdn Bhd, it is trite that the two companies are two separate and distinct corporate entities. It was not pleaded in the statement of claim that an agreement had been entered between the plaintiff and the defendant or that the defendant was a party to the alleged assignment. However, it is appreciated that the plaintiff company could acquire a cause of action if there occurred an assignment and the assignment was effected in compliance with the terms of the option agreement. Thus, the material facts and particulars making out a prima facie case of such assignment has, essentially and vitally, to be pleaded in the statement of claim. Such essential averments cannot be supplemented by affidavit evidence (see *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206). And indeed, even if so pleaded, the defendant's rebuttal by affidavit of such averment(s) in the statement of claim would have to be countered by the plaintiff also by affidavit (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281). And, affidavits from both sides must condescend upon particulars (see *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 and *Perbadanan Pembangunan Ekonomi Sarawak v Sarawak Motor Industries* [1989] 3 MLJ 246), that is not inconsistent with or run counter to undisputed contemporaneous documents or other statements by the same deponent, or is inherently improbable in itself (see *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400). Also, in an O 14 application for summary judgment where a plaintiff has made out a credible prima facie cause of action, the onus rests on the defendant to show cause why leave to defend must be given, by providing answers on oath which constitute evidence in support of a defence which is fit to be tried (see *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363).

Nowhere, not even in para 10 of the statement of claim, was it pleaded that the option agreement had been assigned to the plaintiff pursuant to

cl 19.2. Further, in para 4 of his affidavit (encl 7) the defendant averred that there was never any agreement entered between the plaintiff and the defendant, and this was not rebutted by the plaintiff. Hence, based on the trite principle of evidential law reiterated in *Ng Hee Thoong & Anor*, the failure of plaintiff to contradict the positive assertion of the defendant that the defendant has never entered into any agreement with the plaintiff should be treated as an admission by the plaintiff of the fact so asserted. Also, in *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332, Shankar J had occasion to express this principle in more succinct language, as follows at p 332:

> Where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted.
>
> Where one party gives sworn uncontradicted testimony to prove a fact, that evidence must be accepted because there is nothing in the other end of the scales.

To compound the plaintiff's predicament in the teeth of unsatisfactory pleadings that left much to be desired, their counsel himself conceded that the plaintiff's affidavits do not contain any assertion that there was assignment of the put and call option by PJB Capital Holdings to the plaintiff.

In any event, it is sufficiently apparent from the undisputed contemporaneous documents exhibited, that even if there was a valid assignment, the option agreement had expired by effluxion of time because the plaintiff had failed to exercise their rights within the option period, considering that there was no valid or sufficient notice served on the defendant. The impugned notice dated 17 December 1997 (exh JMA-3 encl 10A) was sent in a manner contrary to cl 16.1 of the option agreement as: (i) it was forwarded by ordinary post and not by registered post (see *Lee Tee & Anor v Seek Lai Neo & Anor* [2000] 2 CLJ 761); (ii) it was sent to Capital Corp Securities Sdn Bhd and not to the defendant; and (iii) it was sent to an address which is different from the defendant's address in the option agreement (see exh JMA-3 and JMA-5 encl 10A). Without the notice, there is no cause of action and the time frame for exercising the put and call option had lapsed.

Given all the aforesaid reasons and having carefully studied the pleadings in conjunction with the affidavits and having heard the oral submissions, I was entirely satisfied that the plaintiff failed to disclose a prima facie cause of action in their pleadings or any of their affidavits and their claim was doomed to failure. The SAR was right to allow striking out of the plaintiff's summons and statement of claim, and I dismissed the appeal with costs. It is incumbent upon the court to determine whether an action could more appropriately be decided without the expense of a full trial. This was such a case, considering the absence of any triable material in the claim placed before the court, see *Suppuletchmi v Palmco Bina Sdn Bhd* [1994] 2 MLJ 368. It is surely a trite truism that success in litigation is dependent not merely upon the real probity of a litigant's case, but how that real probity is squarely presented to the court through methodically crafted

essential ingredients of pleadings (see *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, *Chartered Bank v Yong Chan* [1974] 1 MLJ 157; *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Farrel v Secretary of State* [1980] 1 All ER 166; *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218; *Muniandy & Anor v Muhamad Abdul Kader & Ors* [1989] 2 MLJ 416; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356) as backed up by competent conduct of the case proper. It is, as viewed exclusively through the apex of the prism of pleadings, affidavits and evidence viva voce that a decider is able legitimately — nay legally — to discern the real probity of the case and adjudicate on it within the parameters of set rules and guidelines.

Appeal dismissed with costs.

Reported by Chew Phye Aun